RESPONSE REQUESTED

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No. 06-5247

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

JOHN FRANCIS FRY,

Petitioner,

v.

CHERYL K. PLILER, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California

MARY JO GRAVES
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy Solicitor General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

ROSS C. MOODY
Deputy Attorney General
Counsel of Record

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1376
Fax: (415) 703-1234

Counsel for Respondent

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QUESTIONS PRESENTED

1. Is the exclusion of reliable evidence of third party culpability subject to harmless error analysis?

2. Should this case be remanded to the Ninth Circuit for reconsideration in light of *Holmes* v. *South Carolina*, __ U.S. __, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), and *House* v. *Bell*, __ U.S. __, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006)?

3. Where constitutional error has not been analyzed for harmlessness on direct review, does *Chapman* v. *California*, 386 U.S. 18 (1967) or *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993) apply in federal habeas corpus proceedings? Who bears the burden of persuasion on the issue of prejudice?

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STATEMENT OF THE CASE

Petitioner John Francis Fry was convicted of the first degree murders of Cynthia and James Bell, and was sentenced to life in prison without the possibility of parole. The case against petitioner included ballistics evidence linking his pistol to the murders, his prior threats to kill Cynthia Bell, his truck being seen at the crime scene, and his flight to avoid arrest. Several witnesses also testified that after the killings petitioner returned home covered with blood, and that he admitted shooting the victims.

At trial, petitioner contended that another man, Anthony Hurtz, had confessed to committing the crimes. Petitioner introduced evidence of Hurtz's confessions through seven witnesses. Hurtz testified and denied any involvement in the murders. Testimony from an eighth witness, Pamela

Maples, who also reportedly overheard Hurtz confess, was excluded on foundational grounds. On appeal, petitioner argued that the exclusion of Maples's testimony was erroneous. His convictions were affirmed by the California Court of Appeal. It found that the exclusion of Maples's testimony did not violate state law, and that "no possible prejudice" to petitioner resulted because "very similar testimony" presented by the other witnesses made Maples's testimony "merely cumulative." Pet. App. 131a. The state opinion does not refer to the standard for harmless error established in *Chapman* v. *California*, 386 U.S. 18 (1967).

On August 15, 2001, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the Eastern District of California. The District Court denied the petition in an unpublished order. The District Court adopted a magistrate judge's finding that, although the exclusion of Maples's testimony violated petitioner's constitutional rights and was an unreasonable application of *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), the exclusion was harmless. It applied the "substantial and injurious effect or influence" standard articulated in *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993). Pet. App. at 54a. The District Court reasoned that the jury had heard testimony from many other witnesses regarding Hurtz's purportedly self-confessed involvement in the killings, and that the exclusion of Maples's testimony to the same effect did not have a substantial and injurious

effect on the verdict. Pet. App. at 54a-55a.

The Ninth Circuit affirmed the District Court in an unpublished 2-1 decision. The Ninth Circuit concluded that although the state court had erroneously excluded reliable evidence of a third party's confession to the crime, the error was harmless under *Brecht*. Pet. App. 2a-3a. In a dissent, Judge Rawlinson concluded that the exclusion of Maples's testimony was prejudicial under *Brecht*. Pet. App. 4a-5a. A petition for rehearing en banc was denied. Pet. App. 6a.

REASONS FOR DENYING PETITION

Certiorari should be denied because the petition seeks review of the circuit court's application of a settled rule of law to petitioner's case. The petition suggests no basis to conclude that the rule is the subject of an important dispute among the nation's courts. Moreover, this is not an appropriate vehicle for reaching the issues presented by the petition.

1. Petitioner suggests that the exclusion of "reliable" evidence of third party culpability is structural error. That argument is incorrect. This Court recently reconfirmed the limited class of cases which are not subject to harmless error analysis:

> We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "'most constitutional errors can be harmless.' " *Neder* v. *United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Arizona* v. *Fulminante*, 499

> U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.' " 527 U.S., at 8, 119 S.Ct. 1827 (quoting *Rose* v. *Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal. In such cases, the error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, *supra*, at 9, 119 S.Ct. 1827 (emphasis omitted).

Washington v. *Recuenco*, __ U.S. __, 126 S.Ct. 2546, 2551 (June 26, 2006)(footnote omitted). An "erroneous ruling of the trial court [excluding defense evidence] is subject to harmless error analysis." *Crane* v. *Kentucky*, 476 U.S. 683, 691 (1986). Even where a defendant's constitutional rights are violated due to exclusion of "crucial" defense impeachment evidence, reversal is not compelled, and prejudice must be demonstrated. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 683-84 (1986). Thus, the Court has clearly established that erroneous exclusion of evidence may be found harmless, and petitioner's suggestion to the contrary must be rejected.

2. This Court's recent decisions addressing third party culpability evidence do not justify the granting of certiorari. Petitioner suggests that, in light of *Holmes* v. *South Carolina*, __ U.S. __, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), and *House* v. *Bell*, __ U.S. __, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006), this Court should grant the writ of certiorari, vacate the judgment, and remand to the Ninth

Circuit. Pet. at 21. This Court has held that a GVR order is "potentially appropriate" where "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration . . . ." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996)(per curiam). Neither *Holmes* nor *House*, however, establish principles which create the conditions necessitating a remand to the Ninth Circuit in petitioner's case.

In *Holmes*, this Court reaffirmed that a state may exclude third party culpability evidence under the "widely accepted" evidentiary rules which focus on probative value versus "other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." 126 S.Ct. at 1732-33. (Petitioner's evidence was excluded under such a rule. See Pet. App. 131a (citing Cal. Evid. Code §352).) *Holmes* does not imply that the exclusion of reliable third party evidence cannot "be treated as harmless" as claimed by petitioner. Pet. at 14. Rather, *Holmes* rejected the rule followed in South Carolina that arbitrarily excluded third party culpability evidence regardless of its probative value, or of the possible adverse effect of admitting the defense evidence, so long as there was strong evidence of guilt. 126 S.Ct. at 1734-35. *Holmes* does not imply that all reliable

third party culpability evidence must be admitted much less that its erroneous exclusion can never be harmless. A defendant does not have a right to present even "crucial, relevant evidence" where there is a "valid state justification" for its exclusion. *Montana* v. *Egelhoff*, 518 U.S. 37, 53 (1996). Indeed, this Court has expressly recognized that "relevant evidence can be curtailed if there is a good reason for doing that," such as evidentiary rules like California's Evidence Code section 352 that weigh the probative value against "'confusion of the issues, or potential to mislead the jury.'" *Clark* v. *Arizona*, __ U.S. __, 126 S.Ct. 2709, 2731-32, 165 L.Ed.2d 842 (2006), quoting *Holmes*.

In *House*, the Court discussed the weight to be given to the testimony of two witnesses who testified to hearing the confessions of a third party to the crime at issue. This Court distinguished the testimony of these lay witnesses from the "sort of eleventh-hour affidavit vouching for a defendant and incriminating a conveniently absent suspect" which are "'not uncommon' in capital cases." 126 S.Ct. at 2085 quoting *Herrera* v. *Collins*, 506 U.S. 390, 423 (1993)(O'Connor, J., conc.). *House* involved "an alleged spontaneous statement recounted by two eyewitnesses with no evident motive to lie. For this reason, it [had] more probative value than, for example, incriminating testimony from inmates, suspects, or

friends or relations of the accused." 126 S.Ct. at 2085. Petitioner suggests that *House's* statement about the relative value of an unbiased witness's testimony justifies a GVR order. Pet. at 18, 20-21. Not so.

Maples's lack of bias was a given in the lower courts. The District Court characterized Maples as "the only third party culpability witness who had no apparent bias." Pet. App. 52a. The dissenting panel member characterized Maples as the "only unbiased witness presented by either side." Pet. App. 4a. Nonetheless, both the District Court and Ninth Circuit found that since the jury had heard seven other witnesses provide testimony similar to Maples's proffered testimony, the error was harmless. There is no reason to believe that the Ninth Circuit would reconsider that decision based on the cited passage from *House*. That case, like *Holmes*, does not address harmless error analysis.

3. Petitioner mistakenly suggests that a significant split exists in the circuits regarding the applicable harmless error test on federal habeas corpus where a constitutional error has not been found harmless beyond a reasonable doubt on direct review. Pet. at p. 15. Petitioner acknowledges that the Third, Fourth, Fifth, Seventh, Tenth and Eleventh Circuits have held that "*Brecht*, rather than *Chapman*, enunciates the appropriate standard for determining whether a constitutional error was harmless in a federal habeas challenge to a state conviction or sentence regardless of the standard employed in

the state courts." Pet. at 15, quoting *Hassine* v. *Zimmerman*, 160 F.3d 941, 950 (3rd Cir. 1998). Petitioner maintains that the Second and Ninth Circuits have expressed doubts regarding the proper standard to apply, while the Eighth Circuit has indicated that the *Chapman* test is to be employed. Pet. at 15, citing *Santa-Madera* v. *United States*, 260 F.3d 133, 140 (2nd Cir. 2001); *Allen* v. *Woodford*, 366 F.3d 823, 857, n.6 (9th Cir. 2004); and *Barrett* v. *Acevedo*, 169 F.3d 1155, 1164 (8th Cir. 1999).

There is not a substantial conflict in the circuits which justifies a writ of certiorari. In 2005, the Second Circuit acknowledged that, while it had "previously reserved the question" regarding the appropriate standard of review in a case where *Chapman* was not applied in the state court, "the Supreme Court, in dicta in *Penry* v. *Johnson*, 532 U.S. 782, 795-96 (2001) has applied the standard elaborated in *Brecht* ...." Likewise, the Ninth Circuit, in *Bains* v. *Cambra*, 204 F.3d 964, 976 (9th Cir. 2000), announced that it would "join the vast majority of our sister circuits" and apply *Brecht*, and not *Chapman*, in all habeas cases.

The Eighth Circuit alone continues to assert that the *Chapman* standard is ever appropriate on habeas corpus. But even that court now acknowledges *Chapman* is "generally inapplicable" to collateral review, notwithstanding its use of *Chapman* instead of *Brecht* if the state court has not conducted

harmless error review. *Juarez* v. *Minnesota*, 217 F.3d 1014, 1017 (8th Cir. 2000).

Significantly, the Eighth Circuit has not revisited the issue since *Penry*, which applied *Brecht* in a case where the state court found no error. Any conflict is minor, as the Eighth Circuit may well reverse itself in light of *Penry*. Since there is no pressing need to resolve this issue of harmless error review, a decision by the Court at this juncture appears unnecessary.

4. This case involves a fact-specific inquiry. In the Ninth Circuit, petitioner conceded that "consideration of the issues in this case requires the consideration of many, many facts." App. Opening. Br., 04-16876, at 37. The petition for certiorari characterizes the case as "unprecedented." Pet. at 12. Further review of this fact-bound case is not warranted. Moreover, the decision is unpublished, non-precedential, and hence unlikely to affect the development of the law.

The petition suggests this Court should address the issue of who bears the burden of persuasion on the question of prejudice. Pet. at 24. Petitioner concedes that this issue "is not addressed in the Ninth Circuit's opinion" below. Pet. at 25. Since that issue was not decided by the Court of Appeals, certiorari is not appropriate. See *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001)(per curiam)("We ordinarily do not decide in the first instance issues not decided below")(internal quotation marks omitted).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: October 26, 2006

Respectfully submitted,

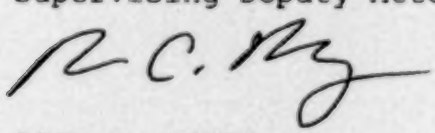
BILL LOCKYER
Attorney General of the State of California

MARY JO GRAVES
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy Solicitor General

PEGGY S. RUFFRA
Supervising Deputy Attorney General



ROSS C. MOODY
Deputy Attorney General
Counsel of Record

Counsel for Respondent

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CERTIFICATE OF SERVICE BY MAIL

I, ROSS C. MOODY, a member of the Bar of this Court, hereby certify that on this October 26, 2006, one copy of the **Brief In Opposition To Petition For Writ of Certiorari** in the above-entitled case was mailed, first class postage prepaid to

Victor S. Haltom
Attorney at Law
428 J Street, Suite 350
Sacramento, CA 95814

Counsel for Petitioner

I further certify that all parties required to be served have been served.

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R. C. M

ROSS C. MOODY
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
(Tel: (415) 703-5994)
Counsel for Respondent